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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1926.**

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**No. 13, Original, In Equity.**

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STATE OF MICHIGAN, COMPLAINANT,

*vs.*

STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, RESPONDENTS.

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**Memorandum of the Respondents in Opposition to the Pending Motion to Amend Bill of Complaint and to Admit the State of New York as a Co-complainant.**

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## Memorandum in Opposition to Complainant's Motion to Amend.

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Respondents object to complainant's motion, which embodies two separable applications, and assign the following reasons:

The above-entitled case has now become a part of the case of Wisconsin *et al. vs.* The Sanitary District (No. 7, Original).

In that suit this Court, on June 7, 1926, referred the cause to Charles Evans Hughes, as Special Master, and in this order permitted the State of Michigan, if it so elected, "to participate in the taking of evidence and in the hearing before the Special Master, *in like*

*manner and with like effect as if that suit had been consolidated with this cause by the Court's order."*

The State of Michigan subsequently elected to participate in the Wisconsin suit and under the conditions of said order.

The Wisconsin suit was begun on June 5, 1922, and has, therefore, been pending in this Court over four years. The issues in the case, as defined by the pleadings, involve the question whether the abstraction of the waters of Lake Michigan by the Sanitary District injuriously affects the navigability of the Great Lakes to the prejudice of the citizens of the complaining States.

The issues thus joined and the taking of testimony about to begin, the State of Michigan, at this late day, not only asks leave to amend its bill in equity, but, in the same motion, the State of New York, not as yet a party to the suit, asks leave to join with Michigan in filing the amended bill.

To this, respondents would not object, if no new issue were raised by the amended bill.

Unfortunately paragraph IV of the proposed amended bill raises a new issue in behalf of and peculiar to New York, which involves new and important questions.

As stated, the other complaining States, including the State of Michigan, claim, in their capacity as *quasi-sovereigns,* to restrain a diversion of water to the extent that it affects the *navigability* of the Great Lakes.

One claim of New York, as set forth in the proposed amended bill, is that such abstraction is an injury to

the State of New York in its *proprietary* capacity, as the owner of the Niagara and St. Lawrence River water rights and the injury averred is in reference to these alleged rights.

This issue, if it is to be determined in the Wisconsin case, raises new and important questions with reference to the application of the powers of the Federal Water Power Commission and may involve the constitutionality of the Federal Water Power Act. The other complaining States, including Michigan, have no justiciable interest in these water rights.

To permit the State of New York to inject this issue into the Wisconsin case at this late day is to complicate the question and possibly to delay the proceedings before the Special Master.

With this explanation of facts, we suggest three objections to the motion:

I. The right of Michigan, as an existing party to the cause, to amend its bill should not be mingled in the same motion with an application of the State of New York to file an original bill. New York should first get permission of this Court to file an original bill and when the issue in that case is formulated, this Court can then determine whether it desires to consolidate it with the Wisconsin case.

II. The motion, if granted, would violate Rule 26 of the Federal Equity Rules, which provides that "where there is more than one plaintiff, the causes of action joined must be joint." If New York only claimed an

injury to its citizens from the alleged impaired navigability of the Great Lakes, its cause of action could be properly joined with that of the other States. When, however, it seeks to inject an issue as to its right to enjoy the flow of lake waters in the Niagara and St. Lawrence River, for water power purposes, free from any use for the same or other purposes by the city of Chicago, it seeks to create an issue in which, as stated, neither the States of Michigan, Ohio, Pennsylvania, Minnesota or Wisconsin, have or claim any justiciable interest.

III. The application of New York comes too late and should be denied on the ground of *laches*. The Wisconsin case has been in this Court for over four years. During all this time, New York could have asked leave to file an original bill to vindicate its alleged water power rights, or it could have asked leave to join as a party complainant with the other States in any case in which the States were jointly interested.

It has, however, waited until issue has been joined upon the question of navigability and a reference made to a Special Master, and then seeks to inject a new issue into the case at the eleventh hour.

## Conclusion.

We submit that the Court should deny this motion. Such denial can, if the Court sees proper, be without prejudice to the right of the State of Michigan to make a new motion to amend its bill and without prejudice

to the State of New York, in a separate motion, to ask leave to file an original bill.

Should such motions be granted, we assume that this Court will give an opportunity to respondents either to file an answer or to move to dismiss, if so advised.

When an issue is thus joined on the new amended bill of Michigan and a new bill by the State of New York, it can then be determined whether the cases should be consolidated with the Wisconsin case.

Respectfully submitted,

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